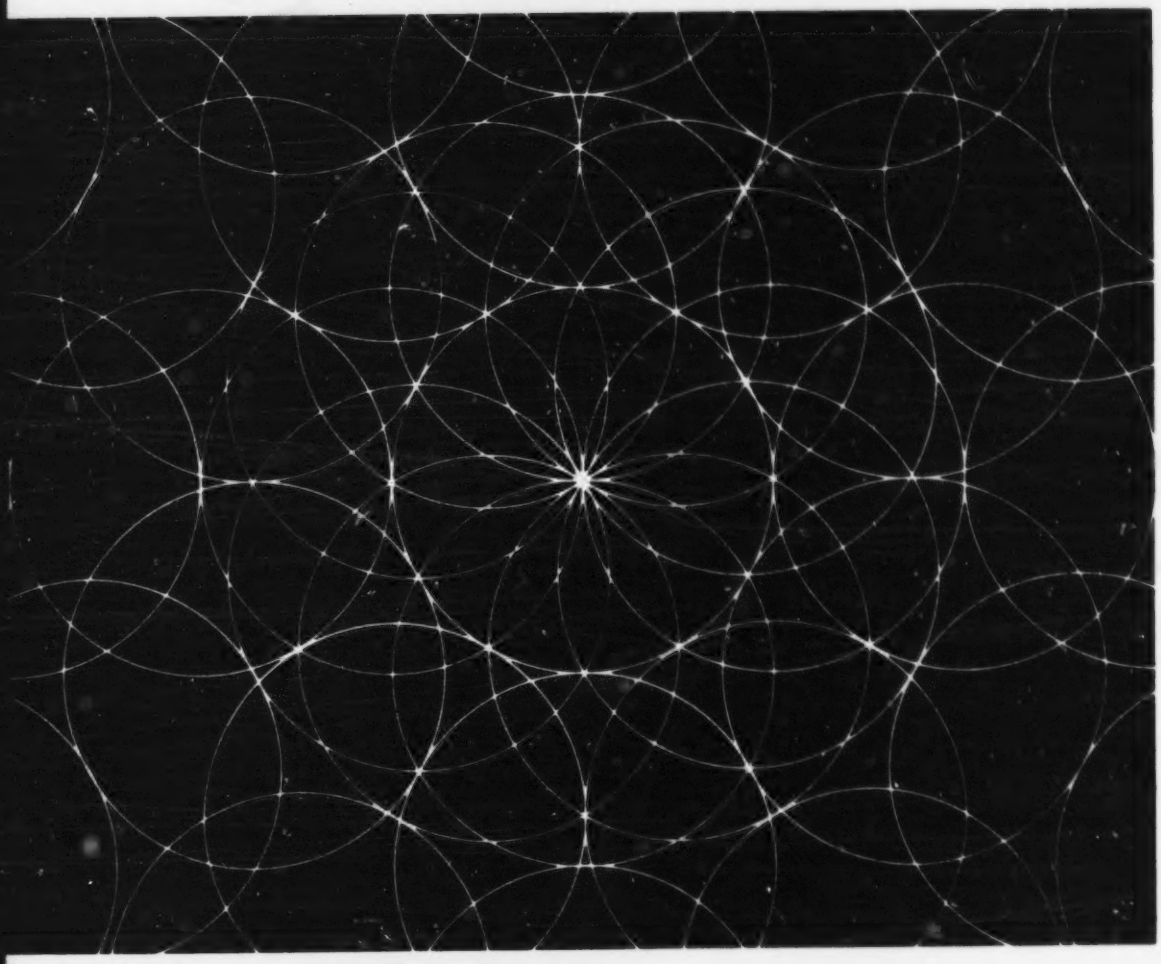
Manitoba

1986

Report on Sections 33 and 34 of "The Wills Act"



Manitoba
Law Reform Commission

86-05968/

LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT
ON
SECTIONS 33 AND 34 OF *THE WILLS ACT*

June 16, 1986

Report #67

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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Canadian Cataloguing in Publication Data

Manitoba. Law Reform Commission.

Report on sections 33 and 34 of The Wills Act
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(Report ; #67)

Includes bibliographical references.
ISBN 0-7711-0131-7

1. Manitoba. Wills Act. 2. Wills -- Manitoba.
I. Title. II. Series: Report (Manitoba. Law Reform Commission) ; #67

KEM245.A72L38 1986 346.712705'4 C86-099320-5

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CHAPTER 1

INTRODUCTION

In January, 1986, Ms. A. Bolton, Q.C., Counsel for the Public Trustee, referred section 34 of *The Wills Act*, C.C.S.M. c. W150, to the Commission. In her reference, she outlined a number of problems with the section, which are discussed later in this Report. She recommended that section 34 be reviewed because of its practical importance to the distribution of many estates.

In this Report we examine section 34 of *The Wills Act*. We also examine section 33 of *The Wills Act* as it presents similar problems. We begin, in Chapter 2, with a discussion of the doctrine of lapse and its exceptions. Following this review, we examine sections 33 and 34 in greater detail and review the need for their reform. Finally, we provide our recommendations for reform.

CHAPTER 2

THE DOCTRINE OF LAPSE AND ITS EXCEPTIONS

A. COMMON LAW

One general principle respecting succession of property is that ordinarily a person who predeceases a testator[1] cannot acquire a gift under the will, since that person does not exist when the will takes effect. Obviously, distribution of such a failed gift in accordance with the testator's wishes is more desirable than distribution according to intestacy laws. Thus, to avoid intestacy, the common law developed the doctrine of lapse. The common law doctrine provides that a gift of personalty falls into the residue of the testator's estate for distribution to the residuary beneficiaries, while a gift of realty is distributed to the testator's lineal descendants.[2] Property which devolves in this way is said to 'lapse'. There are several exceptions to the doctrine.[3]

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[1]'Testator' within this Report refers to a testator or a testatrix.

[2]*Wright* v. *Hall* (1724), 92 E.R. 810. The doctrine also operates where a power of appointment is granted to a person, called the donee, who predeceases the testator. In this case, property that is subject to the power falls into the residue of the testator's estate for distribution to the residuary beneficiaries. The doctrine also operates where the donee survives the testator, but is predeceased by the person to whom (s)he appoints the property. In this case the property either falls (1) into the residue of the donee's estate for distribution to the residuary beneficiaries where (a) the power is a general power, that is, a power to appoint any person, or (b) the power is a special power, that is, a power to appoint specific persons, and the donee's will complies with the power (see *In re Hunt's Trust* (1885), 31 Ch. D. 308), or (2) into the residue of the original testator's estate for distribution to the residuary beneficiaries named in his/her will.

[3]Exceptions at common law include where a gift is given to joint tenants or to a class of beneficiaries. In these circumstances, the deceased's share passes to the surviving joint tenant(s) (*Morley* v. *Bird* (1798), 30 E.R.

(Footnote continued to page 3)

Since the early 1800s, the doctrine of lapse and two exceptions to it have been governed by statute. We turn now to review the Manitoba provisions.

B. STATUTE

1. Section 25 of *The Wills Act*

In Manitoba, the doctrine of lapse is embodied in section 25 of *The Wills Act*.[4] This section modifies the common law doctrine. It provides that any gift, whether of real or personal property, which is left to a beneficiary who predeceases a testator, passes to the testator's estate for distribution to the residuary beneficiaries designated in the will.[5] Obviously, for distribution of a failed gift to these beneficiaries, the will must contain a residuary clause which disposes of the property. If it does not, or if all the residuary beneficiaries predecease the testator, the gift

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(Footnote continued from page 2)
1192 (Ch.)) or surviving class member(s), respectively (*In re Jackson* (1883), 25 Ch. D. 162; *Re Hutton* (1982), 39 O.R. (2d) 622 (H.C.J.)). Other exceptions include where a gift or power of appointment is made in discharge of a legal or moral obligation. In this case, the property passes to the deceased beneficiary's estate (*Re Leach's Will Trusts*, [1948] 1 All E.R. 383 (Ch. D.); *Re McKay* (1949), 24 M.P.R. 267 (N.B.S.C.)). A gift to a charity which ceases to exist prior to the testator's death is distributed to a charity which has a purpose similar to that of the charity which ceases to exist, where the testator showed an intention in the will to benefit charity in general.

[4]This provision originated in the *Wills Act, 1837*, 7 Will. 4 & 1 Vict., c. 26, s. 25 (U.K.), which was received into Manitoba law in 1870. In 1882, Manitoba enacted its own provision (*The Wills Act of Manitoba*, S.M. 1882, c. 2, s. 21). This provision has been virtually unmodified since its original enactment and is now found in *The Wills Act*, C.C.S.M. c. W150, s. 25.

[5]In addition, the section probably applies to general powers of appointment but likely does not apply to special powers of appointment. See, *Eccles* v. *Cheyne* (1856), 69 E.R. 954 (V.C. Ct.); *Holyland* v. *Lewin* (1883), 26 Ch. D. 266 (C.A.).

passes according to intestate succession law.[6]

The operation of section 25 is subject to a contrary intention expressed in the will.[7] A contrary intention is most clearly expressed where provision is made in the will for a substitute beneficiary. In this case, where a beneficiary predeceases the testator, the gift passes to the substitute rather than lapsing.[8] A contrary intention also is manifested where a gift is left to a class of beneficiaries or to two or more persons as joint tenants. In these instances, property intended for a deceased member of the class or joint tenant does not lapse, but passes to the surviving member(s) of the class or joint tenant(s), respectively.[9]

2. Section 34 of *The Wills Act*

Section 34 provides an exception to lapse for gifts to certain close relatives of the testator.[10] The section reads:

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[6]*Stechishin* v. *Palmer*, Man. Q.B., unreported, February 28, 1986, 85-01-08335, Morse J., at 5 *et seq*.

[7]*In re Allan*, [1903] 1 Ch. 276 (C.A.).

[8]If the substitute beneficiary also predeceases the testator, then the gift lapses.

[9]This is so unless all class members or joint tenants predecease the testator, in which case the gift lapses.

[10]The section originated in the *Wills Act, 1837*, which provided that a gift to the testator's child or other issue did not lapse where the child or issue predeceased the testator, but left issue who survived the testator, but took effect as if the beneficiary died immediately after the testator (*Wills Act, 1837*, 7 Will. 4 & 1 Vict., c. 26, s. 33 (U.K.)). Thus, the gift passed to the beneficiaries designated in the child's or issue's will or, if there was no will, or the will did not dispose of the gift, then to those persons entitled to inherit on the beneficiary's intestacy. In 1870, this provision was received into Manitoba law. In 1882, Manitoba enacted legislation which contained a similar provision (*The Wills Act of Manitoba*, S.M. 1882, c. 2, s. 29). In 1936, the Manitoba provision was extended to gifts to sisters and

(Footnote continued to page 5)

> Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person
>
> (a) is a child or other issue or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be; and
>
> (b) leaves issue any of whom is living at the time of the death of the testator;
>
> the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate and without debts immediately after the death of the testator.

Where the requirements of section 34 are met, the section provides for a fictional survival of a child, issue, sister or brother of the testator and for distribution of a gift to that person directly to those persons who are eligible to inherit on that beneficiary's intestacy.[11] That is, distribution is governed by *The Devolution of Estates Act*.[12] Accordingly,

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(Footnote continued from page 4)
brothers of the testator, as well as to class gifts. It became operative whether the beneficiary died before or after the testator made his/her will, and a failed gift went directly to the persons entitled to inherit on the beneficiary's intestacy and as though the deceased died without debts (*The Wills Act*, S.M. 1936, c. 52, s. 30). The section has received only minor amendments since 1936 (*The Wills Act*, S.M. 1964 (1st Sess.), c. 57, s. 33; *The Wills Act*, S.M. 1982-83-84, c. 31, s. 34).

[11] *In re Hensler* (1881), 19 Ch. 612.

[12] *The Devolution of Estates Act*, C.C.S.M. c. D70.

the spouse of a beneficiary is *prima facie* entitled to a preferential share of $50,000 and one-half of the value of the gift in excess of that share.[13] The spouse's entitlement to a preferential share of the gift is reduced by the share that the spouse previously received by virtue of his/her spouse's will or intestacy.[14] The beneficiary's issue are entitled to share *per stirpes*, subject to the rights of the spouse.[15] Thus, where the spouse survives, the issue are entitled to one-half of the residue of the gift in excess of the spouse's preferential share. Where only the issue survive, the issue share the entire gift.

3. Section 33 of *The Wills Act*

The second statutory exception to the doctrine of lapse is embodied in section 33 of *The Wills Act*.[16] The section reads:

> Except where a contrary intention appears by the will, where a person to whom real property is devised for what would have been, under the law of England, an estate tail or in quasi entail,
>
> (a) dies
> (i) in the lifetime of the testator, or
> (ii) at the same time as the testator, or

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[13] *The Devolution of Estates Act*, C.C.S.M. c. D70, ss. 6(1), (2).

[14] *The Devolution of Estates Act*, C.C.S.M. c. D70, s. 14(2).

[15] *The Devolution of Estates Act*, C.C.S.M. c. D70, s. 6(4).

[16] This section originated in section 32 of the *Wills Act, 1837*, 7 Will. 4 & 1 Vict., c. 26, s. 32 (U.K.), which provided that a gift would not lapse where a testator left an estate tail or quasi-entail real property interest to a person who predeceased the testator, leaving issue who were alive at the testator's death and capable of inheriting such an estate. This provision was received into Manitoba law in 1870. In 1882, Manitoba enacted a similar provision in *The Wills Act of Manitoba*, S.M. 1882, c. 2, s. 28. The section has received only minor amendments since its original enactment (*The Wills Act*, S.M. 1936, c. 52, s. 29; *The Wills Act*, S.M. 1964 (1st Sess.), c. 57, s. 32; as re-enacted by *The Wills Act*, S.M. 1982-83-84, c. 31, s. 33).

(iii) in circumstances rendering it uncertain whether that person or the testator survived the other; and

(b) leaves issue who would inherit under the entail if that estate existed;

if any such issue are living at the time of the death of the testator the devise does not lapse but takes effect as if the death of that person had happened immediately after the death of the testator.

Estates tail and quasi-entail interests differ most dramatically from other estates in their applicable rules of inheritance. An estate tail is an estate of inheritance which is given to a beneficiary and descends on that person's death to the issue of that person's body (issue-in-tail) in a direct vertical line of descent. The estate tail continues to descend to the issue-in-tail of the first beneficiary until an owner of the estate (tenant-in-tail) dies without leaving issue of his/her body. When this occurs, the estate tail ceases to exist and the remaining interest in the estate passes to the person entitled in remainder. A quasi-entail is similar to an estate tail, except that it exists only for the duration of the life of the *cestui que vie*, that is, a particular person.

When the requirements of section 33 are met, an estate tail or quasi-entail interest does not lapse, but passes as though the beneficiary of the gift died immediately after the testator. The words of the section have only one effect, due to the peculiar rules which govern estate tail interests. The estate tail or quasi-entail passes to the issue-in-tail of the deceased beneficiary. Such an estate is not devisable by a tenant-in-tail who has left the estate unbarred.

Manitoba is one of only two Canadian jurisdictions where an estate tail or quasi-entail interest can be created.[17] However, while they can be

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[17]Interestingly, estates tail were abolished in Manitoba by sections 27 and 138 of *The Real Property Act*, S.M. 1885, c. 28. However, when this statute was repealed and replaced by *The Real Property Act*, S.M. 1889, c. 16, the new legislation did not contain sections equivalent to sections 27 and 138 of

(Footnote continued to page 8)

created, these interests seldom are encountered for two reasons. First, in the absence of specific words to the contrary, a conveyance transfers an owner's entire rights and title in a property.[18] Thus, an estate tail or quasi-entail estate is not created except by specific words. Second, once created, an estate tail or quasi-entail can be easily barred.[19] That is, it can be easily changed by the owner to a fee simple estate. It is possible that the creation of estates tail and quasi-entail interests should be abolished in Manitoba. However, while we are sympathetic to abolition, this issue will not be considered in this Report,[20] as we do not think it appropriate to stray from the specific reference concerning section 34.

Having provided this introduction to the doctrine of lapse and its exceptions, we now turn our attention to the need to reform sections 33 and 34 of *The Wills Act*.

(Footnote continued from page 7)
the 1885 Act, possibly through inadvertence. In Prince Edward Island, as well, estates tail continue to exist until a deed by the tenant-in-tail is executed and registered (*Real Property Act*, R.S.P.E.I. 1974, c. R-4, s. 17). The other Canadian jurisdictions have abolished estates tail. See, *Property Law Act*, R.S.B.C. 1979, c. 340, s. 10(1); *Law of Property Act*, R.S.A. 1980, c. L-8, s. 9; *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 4; *The Land Titles Act*, R.S.S. 1978, c. L-5, s. 243; *Wills Ordinance*, R.S.Y.T. 1971, c. W-3, s. 19(2); *Wills Ordinance*, R.O.N.W.T. 1974, c. W-3, s. 20(2); *Real Property Act*, R.S.N.S. 1967, c. 261, s. 5; *Property Act*, R.S.N.B. 1973, c. P-19, s. 19; *The Chattels Real Act*, R.S.Nfld. 1970, c. 36, s. 2.

[18]*The Law of Property Act*, C.C.S.M. c. L90, s. 4; *The Wills Act*, C.C.S.M. c. W150, s. 28; *The Real Property Act*, C.C.S.M. c. R30, s. 87.

[19]*The Law of Property Act*, C.C.S.M. c. L90, s. 30.

[20]The Winnipeg Land Titles Office has considered the abolition of the estate tail in its Proposed Bill to Amend The Real Property Act and related Acts, dated March, 1986. The Bill recommends the abolition of the creation of estate tail interests and amendment of section 33 of *The Wills Act* in accordance with this change, in order to simplify the title and land titles forms. The commentary which accompanies its proposals states (at 37):

> The estate tail is an archaic relic of the past, which is virtually unknown and rarely used. This estate is incompatible with todays [sic] standards of equality rights of women, and inhibits the shortening and simplifying of title interests advantageous to the implementation of computerization and issuing of electronic titles, and improved forms.

CHAPTER 3

REFORM OF SECTIONS 33 AND 34 OF *THE WILLS ACT*

A. THE NEED FOR SECTIONS 33 AND 34 OF *THE WILLS ACT*

As mentioned previously, the doctrine of lapse, now embodied in section 25 of *The Wills Act*, was developed to provide for distribution of failed gifts in a manner other than according to intestate succession law. However, in some cases such as where a testator leaves an estate tail or quasi-entail interest to a beneficiary or where a testator leaves a gift to a close relative, distribution in accordance with the doctrine is considered to be inappropriate.[21] Sections 33 and 34 of *The Wills Act* provide statutory exceptions for these two cases.

The Commission considered whether these statutory provisions are appropriate. We concluded that they are appropriate for the following reasons.

First, the rationale behind the original English anti-lapse provisions was that most testators prefer that a gift to a deceased person benefit the issue of that person. As the English Real Estate Commissioners stated in a report prepared for Parliament prior to the enactment of the *Wills Act, 1837* (which Act contained the original forerunners of sections 33 and 34 of the Manitoba Act):

> We believe that in most cases a Testator would prefer the families of the persons to whom he gives estates of inheritance in land, or an absolute property in personalty, to the persons entitled in remainder or his Residuary Legatees . . . .[22]

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[21] A.H. Oosterhoff, *Text, Commentary and Cases on Wills* (2nd ed. 1985) 645; *Anger and Honsberger Law of Real Property* (2nd ed. A.H. Oosterhoff and W.B. Rayner 1985) 1386. See also, T.G. Feeney, *The Canadian Law of Wills: Construction* (1978) 143.

[22] Fourth Report of Commissioners appointed to inquire into The Law of England Respecting Real Property (April 25, 1833), Parliamentary Papers, 1833, v. 22, at 73-74. See also U.K. Parl. Deb. H. of L. Ser. 3, Vol. 36, col. 984 (February 23, 1837).

Recent empirical studies have shown that the rationale behind the original anti-lapse provisions continues to mirror the wishes of many testators. That is, they show that many persons prefer that a failed gift pass to the next-of-kin of the beneficiary, rather than fall into the residue of the testator's estate for distribution to the residuary beneficiaries.[23] This is borne out by a small survey which we ourselves conducted of probated wills in Manitoba. A summary of this survey is contained in Appendix A. In addition, insofar as an estate tail or quasi-entail interest is concerned, the very nature of such an estate raises a presumption that the particular testator who gives such an estate intended that the issue-in-tail of the beneficiary inherit on the beneficiary's death.

Secondly, section 34 acts as an additional safety net to prevent a partial intestacy with respect to a failed gift to a close relative. That is, section 34 prevents a gift to a deceased close relative from devolving as if the testator died intestate, where his/her will does not contain a residuary clause which effectively disposes of the failed gift, or where all the residuary beneficiaries themselves predecease the testator.

Thirdly, uniformity of Manitoba legislation with legislation in other Canadian jurisdictions, as well as with equivalent provisions in the *Uniform Wills Act*, is desirable and should be maintained in the absence of convincing reasons to the contrary. Retention of provisions such as sections 33 and 34 of *The Wills Act* would maintain uniformity of Manitoba legislation with other Canadian legislation and the *Uniform Wills Act*. Retention of section 34 would also maintain uniformity of Manitoba legislation with

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[23] O.L. Browder, "Recent Patterns of Testate Succession in the United States and England" (1969), 67 Mich. L. Rev. 1303; T. J. Mulder, "Intestate Succession under the Uniform Probate Code" (1970), 3 Prospectus 301 at 321-322; M.L. Fellows, R.J. Simon, T.E. Snapp and W.D. Snapp, "An Empirical Study of the Illinois Statutory Estate Plan" (1976), 3 U. Ill. L.F. 717 at 742-743. It has been suggested that the reason for the preference may be that the average testator wants to fulfil the wishes of the deceased beneficiary, that is, distribution of the gift to the deceased's next-of-kin (*Johnson* v. *Johnson* (1843), 67 E.R. 336 at 338 (V.C. Ct.), per Sir J. Wigram). This suggestion, though, has been criticized as "irrational" (A.W. Brooke, "Section 33 of the Wills Act 1837: a Reminder" (1981), 125 Solic. J. 368 at 370).

legislation in England, Australia, New Zealand and the *Uniform Probate Code* of the United States.[24]

For these reasons, we are of the opinion that sections 33 and 34 should be retained.[25]

B. RECOMMENDATIONS FOR REFORM

We accept the need for anti-lapse legislation as set out above. We turn, therefore, to ask the question: Is there a need to reform sections 33 and 34?

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[24]For provisions equivalent to section 34 of *The Wills Act*, see: *Wills Act*, R.S.B.C. 1979, c. 434, s. 29; *The Wills Act*, R.S.A. 1980, c. W-11, ss. 34, 35; *The Wills Act*, R.S.S. 1978, c. W-14, s. 32; *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 32; *The Wills Act*, R.S. Nfld. 1970, c. 401, s. 19; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 84; *Wills Act*, R.S.N.S. 1967, c. 340, s. 30; Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 32; *Administration of Justice Act, 1982*, c. 53, s. 19 (U.K.); *Wills Amendment Act, 1958*, No. 18 of 1958, s. 3 (N.Z.); *Wills, Probate and Administration Act, 1898*, No. 13 of 1898, s. 29 (N.S.W.); *Succession Act, 1981*, No. 69 of 1981, s. 33 (Qld.); *Wills Act 1840*, No. 9 of 1840, s. 33 (Tas.); *Wills Act 1958*, No. 6416 of 1958, s. 31 (Vic.); *Wills Act 1936-1975*, No. 86 of 1975, s. 36 (S.A.); *Uniform Probate Code*, Pt. 2, Intestacy and Wills, Ch. 10, Rules of Construction, s. 10.03 (U.S.). For provisions equivalent to section 33 of *The Wills Act*, see: *The Wills Act*, R.S.S. 1978, c. W-14, s. 31; *The Wills Act*, R.S.A. 1980, c. W-11, s. 33; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 31; *Wills Act*, R.S.N.S. 1967, c. 340, s. 29; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 83; Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 31; *Wills, Probate and Administration Act, 1898*, No. 13 of 1898, s. 28 (N.S.W.); *Wills Act 1840*, No. 9 of 1840, s. 32 (Tas.); *Wills Act 1958*, No. 6416 of 1958, s. 30 (Vic.); *Wills Act 1936-1975*, No. 86 of 1975, s. 35 (S.A.).

[25]Not everyone shares this opinion. See A.W. Brooke, *supra* n. 23, at 370, where he commented that in today's society "with divorce increasingly common and a consequently larger number of broken families, the presumption implicit in . . . [the former English anti-lapse provision] is . . . dangerous; . . . a section to be avoided and a trap for the unwary." A. W. Brooke's opinion was that the presumption that most testators prefer to avoid lapse is likely rarely, if ever, held by the average testator, and as such he favoured repeal of the section. It should be noted though that this criticism is levied against the former English legislation, and it is likely that the same criticism would not be made of the current English legislation which provides that a failed gift pass to the issue of the deceased child.

In considering reform of sections 33 and 34, we believe that our primary objective must be to ensure that these provisions provide a distribution scheme which an average testator would have chosen if (s)he addressed his/her mind to the question and explicitly provided for the distribution of the gift in the event of the death of the beneficiary. Our second objective is uniformity of legislation within Canada, in the absence of reasons which convince us to depart from uniformity.

1. Section 34 of *The Wills Act*

In the reference received by this Commission, several concerns were expressed which suggested a need for reform. The first concern was that the probable objective of section 34, namely, to benefit the issue of certain deceased beneficiaries, is not always realized. Secondly, the reference noted that the section discriminates against the spouse of a deceased beneficiary where that beneficiary does not leave issue who survive the testator, as such a spouse does not benefit from the gift unlike a spouse of a deceased beneficiary who leaves surviving issue. Thirdly, placement of the section within the Act was thought to be misleading, removed as it is from section 25, the general lapse provision. As well, textwriters and other commentators have voiced concerns. In the discussion which follows, we examine each component of section 34 in turn and, in so doing, we consider these problems.

(a) The beneficiaries who are included within section 34

At present, section 34 operates for a gift to a child, issue, sister or brother of the testator. Equivalent legislation in most Canadian jurisdictions[26] and the *Uniform Wills Act*,[27] also operates for a gift to

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[26]*The Wills Act*, R.S.S. 1978, c. W-14, s. 32; *The Wills Act*, R.S.A. 1980, c. W-11, ss. 34, 35; *Wills Act*, R.S.B.C. 1979, c. 434, s. 29; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 32; *Wills Ordinance*, R.O.N.W.T. 1974, c. W-3, s. 22; *Wills Ordinance*, R.O.Y.T. 1971, c. W-3, s. 21; *The Wills Act*, R.S.Nfld. 1970, c. 401, s. 19.

[27]Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 32.

a child, issue, sister or brother of the testator. A different approach is taken in Ontario, where the section operates for a gift to a child, grandchild, sister or brother of the testator.[28] A narrower approach, namely that the provision operate only for a gift to a testator's child or issue, is found in the legislation of Nova Scotia, Prince Edward Island, England, Australia and New Zealand.[29] In the *Uniform Probate Code* of the United States, the equivalent provision operates for a gift to a grandparent and his/her lineal descendants.[30]

In keeping with our primary objective, we are of the opinion that the beneficiaries who should be designated within section 34 are those whose next-of-kin the average testator would want to benefit should that relative predecease the testator. Unfortunately, little research has addressed the issue.[31] Given the lack of empirical research, we believe that the uniformity which Manitoba shares with most Canadian jurisdictions, as well as

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[28]*Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31. The Ontario legislation was amended in 1959 to change the term 'issue' to 'grandchildren'. The amendment was intended to improve estate administration. For example, the amendment narrowed the range of persons which would have to be located for distribution of some gifts. This amendment likely did not result in significant administrative improvements as a gift rarely would be left to issue more remote than grandchildren. See Ontario Law Reform Commission, *Report on the Proposed Adoption in Ontario of The Uniform Wills Act* (1968) 12.

[29]*Wills Act*, R.S.N.S. 1967, c. 340, s. 30; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 84. *Administration of Justice Act, 1982*, c. 53, s. 19 (U.K.); *Wills Amendment Act, 1958*, No. 18 of 1958, s. 3 (N.Z.); *Wills, Probate and Administration Act, 1898*, No. 13 of 1898, s. 29 (N.S.W.); *Succession Act, 1981*, No. 69 of 1981, s. 33 (Qld.); *Wills Act 1840*, No. 9 of 1840, s. 33 (Tas.); *Wills Act 1958*, No. 6416 of 1958, s. 31 (Vic.); *Wills Act, 1936-1975*, No. 86 of 1975, s. 36 (S.A.).

[30]*Uniform Probate Code*, Pt. 2, Intestacy and Wills, Ch. 10, Rules of Construction, s. 10.03 (U.S.).

[31]See Appendix A for some data pertaining to Manitoba wills.

the *Uniform Wills Act*,[32] on this issue, should be maintained. Accordingly, we recommend:

RECOMMENDATION 1

That section 34 of The Wills Act continue to operate for a gift to the testator's child, issue, sister or brother.

(b) The next-of-kin who inherit on the death of the beneficiary

Section 34 reads:

> . . . the devise or bequest does not lapse, but takes effect as if it had been made directly to the persons among whom, and in the shares in which, the estate of that person would have been divisible if that person had died intestate and without debts immediately after the death of the testator.

As discussed previously, where section 34 operates, a gift is distributed according to the scheme set out in *The Devolution of Estates Act*.[33] Where both the spouse and issue of the deceased beneficiary survive, the spouse has a *prima facie* entitlement to a preferential share of $50,000 in addition to one-half of the residue of the gift.[34] The effect of the preferential share is that usually the spouse receives most, if not all, of a small or modest gift, while the issue receive a share only where a gift is large. Consequently, a spouse's *prima facie* entitlement to a preferential share of a gift has been criticized for preventing a benefit from passing to the issue.[35] There are two options available for reform which would ensure that children or other issue of the beneficiary share in the gift.

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[32]Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 32.

[33]*The Devolution of Estates Act*, C.C.S.M. c. D70.

[34]*The Devolution of Estates Act*, C.C.S.M. c. D70, s. 6(2).

[35]Uniform Law Conference of Canada, *Proceedings of the Forty-seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in*

(Footnote continued to page 15)

The first option is that a gift pass to those persons who are entitled to benefit on a deceased beneficiary's intestacy, in accordance with intestacy laws, with the exception that the spouse of the beneficiary have no entitlement to a preferential share. The effect of this change would be that the spouse and issue of the beneficiary would share a gift equally.

Continued entitlement of a spouse to a share in a failed gift, as in this option, is supported by the results of a poll conducted in the United States.[36] In addition to ensuring the issue of a benefit, this option would make Manitoba's legislation on this matter uniform with that of Saskatchewan, Alberta, Ontario and the *Uniform Wills Act*.[37]

In the Commission's opinion, to follow this option would necessitate a determination as to whether a surviving spouse should be entitled to share where the spouses lived separate and apart at the time of death but had not obtained a divorce. Pursuant to the present section 34, such a spouse is entitled to share in a failed gift. However, it is probable that the average testator would not want to benefit the widow(er) of a close relative where the spouses were separated at the beneficiary's death. It is more likely that the average testator would prefer to benefit only the issue of the deceased

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(Footnote continued from page 14)
Canada, (1965) 30, and Uniform Law Conference of Canada, *Proceedings of the Forty-eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada*, (1966) 141-142. A similar criticism, namely that the section did not ensure that a gift pass to issue whose survival had saved the gift from lapse, was levied against a similar, now-repealed provision in the *Wills Act, 1837* (U.K.) which provided that a lapsed gift would devolve as if the deceased beneficiary died immediately after the testator (R.D. MacKay, "Statutory Reform in the Law of Wills" (1983), 133 New L.J. 861 at 863).

[36]M.L. Fellows *et al.*, *supra* n. 23, at 742-743.

[37]*The Wills Act*, R.S.S. 1978, c. W-14, s. 32; *The Wills Act*, R.S.A. 1980, c. W-11, ss. 34, 35; *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31; Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 32.

beneficiary in this circumstance. Thus, the Commission would favour the elimination of a separated spouse's entitlement, as this would conform with our objective to provide for the probable wishes of the average testator.

However, elimination of a separated spouse's entitlement would raise other concerns. First, other provisions of *The Wills Act* differentiate between spouses on the basis of 'divorce' or 'remarriage'.[38] Thus, 'separation' as a criterion for a spouse's entitlement to benefit pursuant to section 34 would depart markedly from the criteria used in other provisions. We believe it would be best to maintain consistency within the Act in this respect. Secondly, such a distinction would result in Manitoba legislation differing from the equivalent legislation in all jurisdictions in Canada and the *Uniform Wills Act*.[39] Of course, such a reform might also increase litigation, as it raises the factual question of whether the spouses were in fact separated when one died.

A second option is complete elimination of a spouse's entitlement to any portion of a failed gift. In this case, only the issue or children of the deceased beneficiary would benefit. According to some commentators, this is likely the result which most testators prefer.[40] This option is desirable for a number of reasons.

First, this option would result in greater consistency between the persons who are entitled to benefit pursuant to section 34 of *The Wills Act*, and those who are entitled to benefit pursuant to *The Devolution of Estates*

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[38] *The Wills Act*, C.C.S.M. c. W150, ss. 18(2), 16(a).

[39] *Wills Act*, R.S.B.C. 1979, c. 434, s. 29; *The Wills Act*, R.S.A. 1980, c. W-11, ss. 34, 35; *The Wills Act*, R.S.S. 1978, c. W-14, s. 32; *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31; *Wills Act*, R.S.N.B. 1973, c. W-9, s. 32; *The Wills Act*, R.S. Nfld. 1970, c. 401, s. 19; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 84; *Wills Act*, R.S.N.S. 1967, c. 340, s. 30; *Wills Ordinance*, R.O.N.W.T. 1974, c. W-3, s. 22; *Wills Ordinance*, R.O.Y.T. 1971, c. W-3, s. 21; Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 32.

[40] G.D. Kennedy, "Wills - Gift to Children or Other Issue Who Predecease Testator Leaving Issue Living at Death of Testator" (1948), 26 Can. Bar Rev. 465 at 466.

Act.[41] At present, on an intestacy, the spouse of an intestate's child, issue, sister or brother is not entitled to benefit. However, pursuant to section 34, the spouse of a testator's child, issue, sister or brother is entitled to benefit when a gift to that person fails. Implementation of this option would result in the surviving spouse of a child, issue, sister or brother of either an intestate or a testator having no entitlement to benefit on an intestacy or failed gift, respectively.

Secondly, the historical rationale behind the section, that is, to benefit the issue of the deceased relative, is supported by studies of probated wills, which demonstrate that the average testator prefers that the children or issue, not the spouse of a deceased relative, benefit in substitution.[42] Although the results of these studies conflict with the

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[41]See Uniform Law Conference of Canada, (1966), *supra* n. 35, at 143-144, where the comment was made with respect to the equivalent *Uniform Wills Act* provision. The provision was thought to be undesirable in that:

> [T]he daughter-in-law, son-in-law, brother-in-law, or sister-in-law being the wife or husband of the testator's child, brother or sister predeceasing him, obtains by virtue of [the] section . . . a portion of the estate of the deceased. It seems that in these circumstances [the gift] . . . should pass to the children of the testator's child, brother or sister and that no part should pass to the in-law. Inasmuch as [t]he Act . . . [the Uniform Law Conference of Canada's equivalent to Manitoba's *The Devolution of Estates Act*] does not permit in-laws to benefit in the event of an intestacy, it seems inconsistent that the Wills Act should change this principle.

[42]The Browder study, *supra* n. 23, at 1323 *et seq*., demonstrated that 40 of 117 substitute beneficiary clauses in wills provided that the children or issue of a deceased beneficiary inherit on the death of a beneficiary. Only 5 wills provided that the spouse of the beneficiary take in substitution. Of these 5, only 2 provided that the spouse take the entire gift. Another 2 wills provided for the gift to be shared equally between the children or issue and the spouse. The last will provided that the spouse benefit only where there were no surviving children (see 1326-1327). See also Appendix A for results of our survey of Manitoba wills, which showed that where a substitute

(Footnote continued to page 18)

results of a study, mentioned above, in which a poll was conducted,[43] in our opinion, the studies of probated wills more accurately reflect the intentions of the average testator, than does a poll, and as such, are more persuasive in determining the direction of reform.

Thirdly, this option would eliminate the need to differentiate between spouses on the basis of whether they were separated at the death of one of the deceased beneficiary, a differentiation which we believe is appropriate but one which would raise other problems, as already discussed.

Fourthly, this option would address the present discord which exists for spouses in the operation of section 34 of *The Wills Act* and subsection 7(3) and clause 4(1)(a) of *The Marital Property Act*.[44] Subsection 7(3) of *The Marital Property Act* stipulates that on an accounting pursuant to that Act, a spouse is not entitled to a share of an inheritance which the other spouse received during cohabitation, "unless it can be shown that the inheritance was devised or bequeathed with the intention of benefitting both spouses". Clause 4(1)(a) of *The Marital Property Act* stipulates that where a spouse received an inheritance following separation, the other spouse has no entitlement whatsoever to that gift on an accounting. Thus, pursuant to *The Marital Property Act*, a spouse generally has no entitlement to an inheritance bestowed on his/her spouse where that inheritance was received by the spouse during his/her lifetime. However, pursuant to section 34 of *The Wills Act*, the surviving spouse of a deceased beneficiary is *prima facie* entitled to a preferential share and one-half of the residue of the inheritance property. This may be so even for separated spouses who made a complete property settlement during their joint lives. The Commission holds the opinion that this discrepancy between the rights of spouses during their joint lives and their rights at death should be eliminated, a result which would occur if spouses were not entitled to benefit pursuant to section 34 of *The Wills Act*.

(Footnote continued from page 17)
beneficiary was named, most testators provided that the children or other issue take the gift.

[43] M.L. Fellows, *et al.*, *supra* n. 23, at 742-743.

[44] *The Marital Property Act*, C.C.S.M. c. M45, ss. 7(3), 4(1)(a).

This option would result in decreased uniformity between section 34 and the equivalent legislation in other Canadian jurisdictions. However, it would result in uniformity between Manitoba legislation and the legislation in Prince Edward Island, England, New Zealand, the *Uniform Probate Code* of the United States and some jurisdictions in Australia, in which only the children or issue benefit,[45] and to a limited extent, British Columbia and Newfoundland legislation.[46] In British Columbia, a spouse is not entitled to share where issue survive, but can benefit where no issue survive. In Newfoundland, where a gift is left to a testator's sister or brother, only the beneficiary's children benefit.

In summary, although the first option, which ensures that both the spouse and issue benefit, is not without merit, on balance, the Commission favours the second option. We recommend:

RECOMMENDATION 2

That section 34 of The Wills Act be amended so that only the issue or children of the deceased beneficiary be entitled to benefit.

Having made this recommendation, it is unnecessary for us to consider the criticism that section 34 discriminates by benefitting a surviving spouse where issue of the deceased beneficiary survive the testator and not benefitting a spouse where no issue survive.

The Commission considered expansion of the term 'issue' within section 34 to include issue *en ventre sa mère*, that is, issue who are conceived but not yet born. At common law, within the context of lapse of a

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[45] *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 84; *Administration of Justice Act, 1982*, c. 53, s. 19 (U.K.); *Wills, Probate and Administration Act, 1898*, No. 13 of 1898, s. 29 (N.S.W.); *Succession Act, 1981*, No. 69 of 1981, s. 33 (Qld.); *Wills Act, 1958*, No. 6416 of 1958, s. 31 (Vic.); *Wills Amendment Act, 1958*, No. 18 of 1958, s. 3 (N.Z.); *Uniform Probate Code*, Pt. 2, Intestacy and Wills, Ch. 10, Rules of Construction, s. 10.03 (U.S.).

[46] *Wills Act*, R.S.B.C. 1979, c. 434, s. 29(1); *The Wills Act*, R.S. Nfld. 1970, c. 401, s. 19.

testamentary gift, the term 'issue' is interpreted to exclude issue *en ventre sa mère*.[47] As section 34 does not specifically include issue *en ventre sa mère*, they are excluded within its context. Thus, where a beneficiary dies leaving only issue *en ventre sa mère* to survive the testator, the next-of-kin of that beneficiary are not entitled to benefit because the beneficiary is interpreted as not leaving issue who survive the testator. Extension of the term 'issue' to include issue *en ventre sa mère* within section 34 would eliminate the discrimination which exists when section 34 does not operate because only issue who are conceived but not yet born exist at the testator's death. In addition, generally, in other succession contexts, the term 'issue' includes issue *en ventre sa mère*. Thus, extension of this term in the lapse context would simplify the law, in that 'issue' would then include issue *en ventre sa mère* whether the context was avoidance of lapse or another succession law context. Several Canadian jurisdictions, including Ontario, take this approach.[48] We recommend:

RECOMMENDATION 3

That the term 'issue' within section 34 of The Wills Act include issue en ventre sa mère.

(c) The inclusion of class gifts

The Commission has considered whether section 34 should continue to extend to class gifts.[49] We acknowledge that the argument against including

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[47] *Elliot* v. *Joicey*, [1935] A.C. 209 (H.L.), which overrode *In re Griffiths' Settlement*, [1911] 1 Ch. 246.

[48] *The Wills Act*, R.S.Nfld. 1970, c. 401, s. 19(1); *Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 1(1)(a), (c); *Wills Act*, R.S.N.S. 1967, c. 340, s. 1(a). The English legislation also makes provision for issue *en ventre sa mère* (*Administration of Justice Act, 1982*, c. 53, s. 19(4)(b) (U.K.)).

[49] A class is a group of persons, the parameters of which are understood by a general description, where the members bear a relationship to either the testator or another person. A gift by a testator to all his children by name

(Footnote continued to page 21)

class gifts is that a testator who makes a class gift normally intends to benefit only those members of the class who are alive at his death or born subsequently.[50] If this is true, inclusion of class gifts within the anti-lapse provision would defeat the testator's intention. However, we are persuaded that class gifts should continue to be included within the ambit of section 34 for three reasons. First, the distinction between a class gift and an individual gift is often technical and arbitrary. For example, where a number of individual beneficiaries are named or their number specified, generally a gift to those beneficiaries is categorized as an individual gift,[51] but sometimes it may be categorized as a class gift. As the Ontario Court of Appeal commented with respect to a since-amended Ontario provision, which did not extend to class gifts:

> . . . [T]he rule rests on the technical rules of law relating to gifts to a class, and has nothing to do with the probable intentions of the testator. The ordinary testator would probably be surprised to learn that it might make a vast difference in the effect of a gift to be divided among all his children, whether or not they were named.[52]

Inclusion of class gifts within section 34 eliminates any problem concerning these technical distinctions. Secondly, the operation of section 34 is much wider when the section is applicable to class gifts.[53] Thirdly, inclusion

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(Footnote continued from page 20)
is not a class gift. See, *In re Munro Estate* (1951), 2 W.W.R. (N.S.) 295 (Man. K.B.).

[50]Ontario Law Reform Commission, *supra* n. 28, at 12.

[51]T.J. Feeney, *supra* n. 21, at 150. But see, *Re Snyder* (1960), 22 D.L.R. (2d) 71 (Ont. H.C.).

[52]*Re Guthrie* (1924), 56 O.L.R. 189 at 195-196 (C.A.) per Smith J.A. and quoted with approval by O'Driscoll J. in *Re Lightfoot* (1985), 50 O.R. (2d) 346 at 349-350 (H.C.J.). See also, *Re Doig* (1926), 30 O.W.N. 305 (S.C., H.C.D.).

[53]*Re Guthrie, ibid.*

of class gifts would maintain Manitoba's uniformity on this issue with most Canadian jurisdictions,[54] and the *Uniform Wills Act*, as well as England, New Zealand, some Australian territories and the *Uniform Probate Code* of the United States.[55] For these reasons, we recommend:

RECOMMENDATION 4

That section 34 of The Wills Act continue to operate for class gifts.

(d) The phrase: "not determinable at or before the death" of the beneficiary

The Commission has considered the phrase "real or personal property not determinable at or before the death of the child or other issue or the brother or sister, as the case may be".

A 'determinable' interest is one which is liable to come to an end upon the happening of a certain contingency. It includes an interest which is a percentage of the testator's estate, the amount of which is unascertainable prior to his/her death, or it may be a specific bequest or devise.[56] An example of a determinable interest is an interest in a joint tenancy

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[54]Only Ontario, Nova Scotia and Prince Edward Island have anti-lapse provisions which apply only to individual gifts (*Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31; *Wills Act*, R.S.N.S. 1967, c. 340, s. 30; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 84). In Newfoundland, the provision applies only to individual gifts where a gift is given to a child or issue, but applies to both individual and class gifts for gifts to sisters and brothers of the testator (*The Wills Act*, R.S.Nfld. 1970, c. 401, ss. 18, 19).

[55]Uniform Law Conference of Canada, *Uniform Wills Act*, March 1981, s. 32; *Administration of Justice Act, 1982*, c. 53, s. 19 (U.K.); *The Wills Act, 1958*, No. 6416 of 1958, s. 31 (Vic.); *Succession Act 1981*, No. 69 of 1981, s. 33 (Qld.); *Wills Amendment Act, 1958*, No. 18 of 1958, s. 3 (N.Z.); *Uniform Probate Code*, Pt. 2, Intestacy and Wills, Ch. 10, Rules of Construction, s. 10.03 (U.S.).

[56]*Re Nixey* (1972), 31 D.L.R. (3d) 597 (Man. Q.B.), foll'd by *Stechishin v. Palmer*, *supra* n. 6, at 4.

determinable on the death of one of the joint tenants.[57] Another example of a determinable interest is a gift which is dependent upon the beneficiary attaining a certain age. The interest determines if the beneficiary dies without attaining the specified age.[58] A gift which is a determinable interest does not fall within the operation of section 34.

In our opinion, the purpose of section 34 is to provide relief against the effect of the death of a close relative during the lifetime of the testator. It is not intended to provide relief against the effect of death of a relative who did not attain a certain age, or fulfil some other condition, the attainment of which was a condition of a gift.[59] Therefore, it is appropriate that the operation of section 34 continue to be restricted to property which is not determinable at or before the death of the beneficiary. This restriction would maintain Manitoba's uniformity with most other Canadian jurisdictions on this issue.[60] We recommend:

RECOMMENDATION 5

That the phrase "not determinable at or before the death of the child or other issue or the brother or sister" in section 34 of The Wills Act be retained.

(e) The phrase: "before or after the testator makes the will"

The Commission has considered the phrase "before or after the testator makes the will". The rationale for this phrase is that most testators want the next-of-kin of a beneficiary who dies prior to the will

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[57] *Re Butler*, [1918] 1 I.R. 394.

[58] *Re Wolson*, [1939] 3 All E.R. 852 (Ch. D.).

[59] *Ibid.*

[60] Only Ontario does not restrict the application of the provision in this way (*Succession Law Reform Act*, R.S.O. 1980, c. 488, s. 31). England and the United States are similar to Ontario in this respect (*Administration of Justice Act, 1982*, c. 53, s. 19 (U.K.); *Uniform Probate Code*, Pt. 2, Intestacy and Wills, Ch. 10, Rules of Construction, s. 10.03 (U.S.)).

being executed to be treated in the same way as the next-of-kin of another beneficiary who dies subsequent to the execution of the will and predeceases the testator.[61]

Doubt has been expressed as to the necessity of this phrase for the reason that the words "during his lifetime" seem to convey the same meaning.[62] Notwithstanding that this may be the usual interpretation, in our opinion, in the absence of the present phrase, section 34 could be construed as applying only to cases where the beneficiary dies after execution of the testator's will. It might be assumed, without the present phrase, that the testator simply made an error if, when (s)he makes his/her will, (s)he leaves a gift to a relative who is already dead.[63] Indeed, one Ontario Court stated that a beneficiary who predeceases the testator, prior to his/her execution of the will, is not included when the phrase "during his lifetime" is used.[64] Therefore, out of an abundance of caution, we recommend that the phrase, "before or after the testator makes the will" be retained. In this case, Manitoba's legislation would remain uniform with that of most Canadian jurisdictions, as well as the *Uniform Wills Act*.[65] We recommend:

RECOMMENDATION 6

That the phrase "before or after the testator makes the will" be retained in section 34 of The Wills Act.

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[61] *Uniform Probate Code*, Commentary, at 149.

[62] Ontario Law Reform Commission, *supra* n. 28, at 12.

[63] A.H. Oosterhoff, *supra* n. 21, at 648.

[64] *Re Sheard* (1921), 49 O.L.R. 320 (C.A.). See also *Re Williamson* (1931), 40 O.W.N. 416 (H.C.). However, generally the phrase 'during his lifetime' is interpreted to mean at any time during the testator's lifetime. See *Re McCallum* (1924), 27 O.W.N. 169 (H.C.).

[65] Only Nova Scotia and Prince Edward Island legislation do not contain this provision (*Wills Act*, R.S.N.S. 1967, c. 340, s. 30; *Probate Act*, R.S.P.E.I. 1974, c. P-19, s. 84). New Zealand, the United States and Queensland legislation also contains this provision (*Wills Amendment Act, 1958*, No. 18 of 1958, s. 3 (N.Z.); *Uniform Probate Code*, Pt. 2, Intestacy and Wills, Ch. 10, Rules of Construction, s. 10.03 (U.S.); *Succession Act 1981*, No. 69 of 1981, s. 33 (Qld.)).

(f) Section 34, an exception to section 25 of *The Wills Act*

The placement of section 34 within *The Wills Act* has been criticized as misleading. It is not obvious by either the placement or the wording of the section that it is an exception to the general lapse rule in section 25. To remedy this problem we recommend:

RECOMMENDATION 7

That the placement of section 34 of The Wills Act be changed and the wording of section 25 of The Wills Act be amended to reflect more clearly that section 34 provides an exception to section 25.

2. Section 33 of *The Wills Act*

While we acknowledge the need for section 33, we perceive three problems. First, an overlap in the operation of sections 33 and 34 of *The Wills Act* exists when an estate tail or quasi-entail interest is given to a child, issue, brother or sister of the testator. Secondly, the placement of the section is misleading, removed as it is from section 25, the general lapse provision. Thirdly, the term 'issue' within the section needs consideration.

(a) Overlap of sections 33 and 34 of *The Wills Act*

The Commission has considered the overlap of sections 33 and 34; both sections may operate where a testator leaves an estate tail or quasi-entail interest in real property to a child, issue, sister or brother who predeceases him/her. The operation of the two provisions produces different results. Pursuant to section 33, the beneficiary's issue-in-tail inherit the estate. Pursuant to section 34, the gift devolves according to intestate succession law. No authority resolves the conflict of which section applies in this circumstance.

The problem could be resolved in one of two ways. First, section 33 could be amended so that it is not applicable where an estate tail or quasi-entail real property interest is left to a testator's child, issue, sister or brother. The effect of this amendment is that section 34 would apply to all gifts including estate tail and quasi-entail interests, to these close relatives. Alternatively, section 34 could be made inapplicable to

estate tail or quasi-entail real property interests. In this case, all estate tail and quasi-entail real property interests which fail because of the death of the beneficiary before the testator would be dealt with pursuant to section 33.

The Commission has considered these alternatives and has decided, for several reasons, that the operation of section 34 should be made subject to section 33. First, the very peculiar nature of an estate tail or quasi-entail interest is such that whether an interest is given to a child, issue, sister or brother of the testator, or to another beneficiary, there can be little doubt as to the intention of a particular testator who devises such an interest. That is, it is apparent by the very nature of the estate that the testator intends that the interest pass to the issue-in-tail of the beneficiary on the beneficiary's death. Secondly, by definition, an estate tail or quasi-entail interest is an interest which devolves to the issue-in-tail of the first beneficiary. Thus, such an estate could not be distributed to the issue of the deceased beneficary, as provided by section 34, and remain an estate tail or quasi-entail interest. Thirdly, the Commission believes that the probable beneficiaries of such interests would be the close relatives of the testator. Thus, if the operation of section 33 was made subject to section 34, the consequence would be that the already narrow importance of section 33 would be completely eliminated. For these reasons, we recommend:

RECOMMENDATION 8

That section 34 of The Wills Act be amended so that its operation is subject to the operation of section 33 of The Wills Act.

(b) Section 33, an exception to section 25 of *The Wills Act*

The placement of section 33, as well as the wording of section 25 of *The Wills Act*, should be changed to make it obvious that the section is an exception to the general lapse provision found in section 25. We recommend:

RECOMMENDATION 9

That the placement of section 33 of The Wills Act be changed and the wording of section 25 of The Wills Act be amended to reflect more clearly that section 33 provides an exception to section 25.

(c) Issue

Finally, the Commission has considered whether the term 'issue' within section 33 should be extended to include issue *en ventre sa mère*, as we recommended for section 34. We concluded that 'issue' should be extended in this manner for consistency of legislation within Manitoba. The effect of this reform would be that where issue who are eligible to inherit the estate tail or quasi-entail estate are conceived at the testator's death and subsequently born alive, the estate would pass to the issue-in-tail of the deceased beneficiary. We recommend:

RECOMMENDATION 10

That the term 'issue' within section 33 of The Wills Act include issue en ventre sa mère.

C. THE REFORMING LEGISLATION

Subsection 14(2) of *The Devolution of Estates Act*[66] states that where a spouse is entitled to a share of a gift intended for his/her deceased spouse by virtue of section 34 of *The Wills Act*, the surviving spouse's entitlement to a preferential share of that gift is to be reduced by an amount equal to the amount which (s)he has already received from the deceased spouse's estate either under the deceased's will or by virtue of *The Devolution of Estates Act*. Having recommended that the surviving spouse's entitlement to any portion of such a gift be eliminated, there is no longer a need for section 14(2). Therefore, we recommend:

RECOMMENDATION 11

That section 14(2) of The Devolution of Estates Act be repealed.

It remains for us to consider the need for a transition provision respecting the recommended amendments to section 34 of *The Wills Act*. It is our opinion that the proposed amendments should not affect the entitlement of any person to receive a benefit under a will by virtue of section 34, where

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[66] *The Devolution of Estates Act*, C.C.S.M. c. D70, s. 14(2).

the testator died before the day the amendments come into force. Therefore, we recommend:

RECOMMENDATION 12

That a transition provision be enacted which provides that the amendments to section 34 of The Wills Act will not affect the entitlement of any person to receive a benefit under a will by virtue of section 34 of The Wills Act, where the testator died before the coming into force of the amendments.

In order to implement the above recommendations, enabling legislation will be required. We recommend:

RECOMMENDATION 13

That legislation be enacted similar to the Proposed Act to Amend The Wills Act set out in Appendix B.

CHAPTER 4

LIST OF RECOMMENDATIONS

1. That section 34 of *The Wills Act* continue to operate for a gift to the testator's child, issue, sister or brother. (p. 14)

2. That section 34 of *The Wills Act* be amended so that only the issue or children of the deceased beneficiary be entitled to benefit. (p. 19)

3. That the term 'issue' within section 34 of *The Wills Act* include issue *en ventre sa mere*. (p. 20)

4. That section 34 of *The Wills Act* continue to operate for class gifts. (p. 22)

5. That the phrase "not determinable at or before the death of the child or other issue or the brother or sister" in section 34 of *The Wills Act* be retained. (p. 23)

6. That the phrase "before or after the testator makes the will" be retained in section 34 of *The Wills Act*. (p. 24)

7. That the placement of section 34 of *The Wills Act* be changed and the wording of section 25 of *The Wills Act* be amended to reflect more clearly that section 34 provides an exception to section 25. (p. 25)

8. That section 34 of *The Wills Act* be amended so that its operation is subject to the operation of section 33 of *The Wills Act*. (p. 26)

9. That the placement of section 33 of *The Wills Act* be changed and the wording of section 25 of *The Wills Act* be amended to reflect more clearly that section 33 provides an exception to section 25. (p. 26)

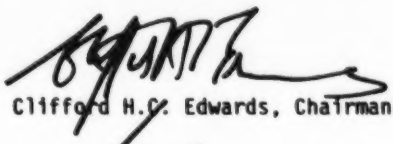
10. That the term 'issue' within section 33 of *The Wills Act* include issue *en ventre sa mere*. (p. 27)

11. That section 14(2) of *The Devolution of Estates Act* be repealed. (p. 27)

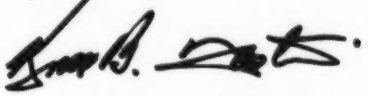
12. That a transition provision be enacted which provides that the amendments to section 34 of *The Wills Act* will not affect the entitlement of any person to receive a benefit under a will by virtue of section 34 of *The Wills Act*, where the testator died before the coming into force of the amendments. (p. 28)

13. That legislation be enacted similar to the Proposed Act to Amend The Wills Act set out in Appendix B. (p. 28)

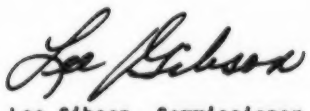
This is a Report pursuant to section 5(2) of *The Law Reform Commission Act*, signed this 16th day of June 1986.



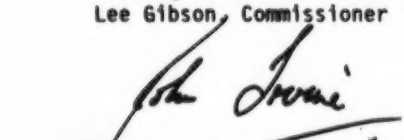
Clifford H.C. Edwards, Chairman



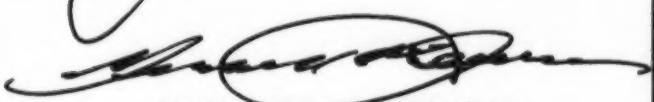
Knox B. Foster, Commissioner



Lee Gibson, Commissioner



John C. Irvine, Commissioner



Gerald O. Jewers, Commissioner

APPENDIX A

SURVEY OF PROBATED WILLS IN MANITOBA

The survey examined 350 probate and administration files at the Manitoba Court of Queen's Bench-Probate Division Office, which represented approximately 10% of the total files for 1985. Of these, 278 were probate files which contained wills. Each of the 278 wills was examined and information as to the testamentary gifts to children, issue or siblings of the testator was noted. In particular, information as to substitute beneficiaries, if any, was noted. Table 1 sets out the number of testamentary gifts given to either a child, grandchild, other issue, sister or brother of the testator, and the categories and number in each category of substitute beneficiaries. Table 2 sets out the distribution of substitute gifts listed in Table 1, in percentages.

Table 1. Number of Testamentary Gifts to Close Relatives of the Testator and to Substitute Beneficiaries of those Relatives (see notes)

Primary Beneficiary[1]		Substitute Beneficiary				
		none	child/ issue[2]	spouse[2]	residuary beneficiary	other
child	195	143	42	9	0	3
grandchild	90	86	1	0	2	1
other issue[3]	8	8	0	0	0	0
brother/ sister	47	28	6	3	4	6
TOTAL GIFTS	340	265	49	12	6	10

[1]Relationship to testator

[2]Relationship to primary beneficiary

[3]Issue other than child or grandchild of testator

Table 2. Distribution of Substitute Gifts, by category, in percentages, where a substitute is specified and the primary beneficiary was a close relative[1] of the testator

Substitute Beneficary	% of Substitute Beneficiaries
child/issue[2]	63.6
spouse[2]	15.6
residuary beneficiary	7.8
other	13.0
TOTAL	100.0

[1]Close relatives include a child, grandchild, other issue, sister or brother of the testator.

[2]Relationship to primary beneficary.

NOTES

1. Number of gifts. The number of gifts listed in Table 1 is greater than the number of wills studied, as each will frequently contained greater than one gift. The numbers do not represent all testamentary gifts contained in the wills studied. Only those gifts to close relatives of the testator are tabulated.

2. Class/individual gift. Both class and individual gifts are included and each is tabulated as a single gift. For the purpose of this survey, where all individuals in a group of beneficiaries were named in a will, a gift to each person in the group was considered to be an individual gift.

3. Substitute beneficiary. A substitute beneficiary is a beneficiary who is first in line to inherit in substitution for a primary beneficiary.

4. Number of substitute gifts. The number of substitute gifts does not equal the number of primary gifts because in several cases more than one category of substitute beneficiaries was provided to share a gift in substitution for a primary beneficiary.

5. Beneficiaries excluded. Where a primary beneficiary's relationship to the testator was not clearly described in the will, a gift to that beneficiary was excluded from the survey.

6. 'Other' substitute beneficiary. This category of substitute beneficiaries includes those beneficiaries whose relationship to the primary beneficiary was not clearly described in the will.

APPENDIX B

An Act to Amend The Wills Act

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Sec. 25 am.

1. Section 25 of *The Wills Act*, being Chapter 31 of the Statutes of Manitoba, 1982-83-84 (Chapter W150 in the Continuing Consolidation of the Statutes of Manitoba), is amended

(a) by renumbering the section as subsection (1); and

(b) by adding thereto immediately before the word "Except" in the first line thereof the words "Subject to subsections (2) and (3)".

Subsec. 25(4) added.

2. Section 25 of the Act is further amended by adding thereto, immediately after subsection (3) thereof, the following subsection:

Definition of issue.
25(4) For the purpose of subsections (2) and (3), a person conceived before the testator's death, and born living thereafter, is to be taken to have been living at the testator's death.

Sec. 33 am.

3. Section 33 of the Act is amended by renumbering the section as subsection 25(3).

Sec. 34 am.

4. Section 34 of the Act is amended

(a) by renumbering the section as subsection 25(2);

(b) by adding thereto immediately before the word "Except" in the first line thereof the words "Subject to subsection (3)"; and

(c) by adding the words "without leaving a spouse" immediately after the word "intestate" in the 13th line thereof.

Subsec. 38(2) am.

5. Subsection 38(2) of the Act is amended by adding thereto, immediately after the words "April 16, 1964" in the first line thereof, the words "and before the coming into force of this subsection", and is further amended by adding thereto, immediately after the words "section 34" in the first line thereof, the words "of The Wills Act, being chapter 31 of the Statutes of Manitoba, 1982-83-84, as it was before the coming into force of this subsection".

Subsec. 38(4) added.

6. Section 38 of the Act is further amended by adding thereto, immediately after subsection (3), the following subsection:

Application of subsec. 25(2)
38(4) Where a person dies on or after the day that subsection 25(2) comes into force, subsection 25(2) applies to the will of the person whether it was made before or after that date.